80-1470

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LUTHER T. PENNINGTON and
SENATOR HARDING COLBERT,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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February, 1981

QUESTION PRESENTED

Whether the execution of a federal search warrant by a State officer, which warrant was issued by a U. S. Magistrate for violation of a federal statute and directed to a Federal officer for service, renders the evidence seized under the warrant inadmissible in a federal prosecution where there was no Federal officer present during the execution of the search warrant and the State officer conducted an abusive search of the premises by virtually destroying the interior and exterior of the property searched?

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No. ———

In the Supreme Court of the United States

OCTOBER TERM, 1980

LUTHER T. PENNINGTON and
SENATOR HARDING COLBERT,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Luther T. Pennington and Senator Harding Colbert, pray that a Writ of Certiorari issue to review the judgment therein of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, is set out as Appendix "A" hereto.[1] The Dissenting Opinion is set out as Appendix "B" hereto. The Order of the United States District Court for the Eastern District of Oklahoma, dated and filed July 6, 1979, is set out as Appendix "D" hereto.

[1] Appendix References are to Appendices to this Petition. Record References are to the volume (Roman numerals) and page (Arabic numerals) of the Record in the court below.

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on December 3, 1980. The Dissenting Opinion was entered on December 5, 1980.

Petitioners' timely Petition for Rehearing was denied by Order of the United States Court of Appeals, entered on January 14, 1981, which is set out as Appendix "C".

The jurisdiction of this Court is invoked under Tit. 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provision involved is the Fourth Amendment, which is set out at Appendix "F", p. F-1.

The statutes involved are Conspiracy to Possess Marijuana With Intent to Distribute, 21 U.S.C. 846 and 21 U.S.C. 841; Persons Authorized to Serve Search Warrants, 18 U.S.C. 3105 and Rules of Criminal Procedure, 18 U.S.C. 3771, the pertinent text being set out in Appendix "F", pp. F-1 and F-2.

The rule involved is Search and Seizure, Rule 41 of the Federal Rules of Criminal Procedure, the pertinent text being set out in Appendix "F", p. F-2.

STATEMENT OF THE CASE

In a two-count indictment filed May 31, 1979 (R.-I, p. 1), the Grand Jury of the United States for the Eastern District of Oklahoma charged petitioners in Count I with Conspiracy to Possess With Intent to Distribute Marijuana, Tit. 21 U.S.C. §846. While Count II charged that petitioners Possessed With Intent to Distribute Marijuana, Tit. 21 U.S.C. §841(a)(1) and Tit. 18 U.S.C. §2.

An Evidentiary Hearing on petitioners' Motion to Suppress was held on June 25, 1979. The court issued its Order overruling the Motion to Suppress on July 6, 1979.

Petitioners waived jury trial and agreed to the stipulation of facts (R.-I, pp. 34-66), for the non-jury trial on July 16, 1979, subject to objections to evidence seized under the purported authority of the search warrant. The trial court granted the Government's Motion to Dismiss Count II as to each petitioner. Petitioners reurged their Motion to Suppress, which was overruled. The trial court found each petitioner guilty as charged in Count I.

The trial court, on September 5, 1979, sentenced petitioner Luther T. Pennington to the custody of the Attorney General for imprisonment for a period of four (4) years, and imposed a special parole term of two (2) years. Petitioner Senator Harding Colbert was sentenced to the custody of the Attorney General for imprisonment for a period of two (2) years, with the execution of sentence suspended and petitioner placed on probation for a period of three (3) years and imposed a special parole term of two (2) years. The Appeal was limited to the suppress issues, and the Court of Appeals affirmed the judgments of conviction.

The facts pertinent to this case involve the execution of the federal search warrant by a state officer, without supervision or presence of a federal law enforcement officer, where the search warrant was directed to a federal officer.

A Pontotoc County Deputy Sheriff, Lloyd Bond, received information from a reliable, confidential informant that the informant had seen what he believed to be marijuana growing in a greenhouse located on a farm in rural Ada, Oklahoma. Deputy Bond then contacted Oklahoma State Agent Freddie Means.

State Agent Freddie Means talked with the informant by telephone before conferring with an assistant U. S. Attorney in Muskogee, Oklahoma. The Assistant U. S. Attorney arranged an appointment for the state agent to meet with the U. S. Magistrate regarding a search warrant.

The state agent appeared alone before the U. S. Magistrate in McAlester, Oklahoma, and was the affiant for the search warrant issued by the U. S. Magistrate. The Magistrate directed the warrant "To: U. S. Marshal, or any other authorized law enforcement law officer."

State Agent Means, rather than contacting a U. S. Marshal or appropriate federal officer, took the warrant to Ada and executed it with four other county and state officers.

It was established at the Suppression Hearing that State Agent Freddie Means was not a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or a person so authorized by the President of the United States. Further, there was no such officer

present when the five state and county officers executed the search warrant on petitioners' premises.

The state officers in executing the federal search warrant without any federal officer being present, conducted an abusive search of the premises by virtually destroying both the interior and exterior of the greenhouse. Petitioners' Exhibits 1 through 9 (R.-I, pp. 86-94) were admitted as photographs accurately depicting the greenhouse as it existed after the officers searched the premises — reflecting the greenhouse having been stripped, heating system torn up, plumbing destroyed, lights broken, sides slashed and other damage sustained.

Petitioner Colbert testified that he and petitioner Pennington were both inside the greenhouse when the law enforcement authorities came out to search on May 7, 1979. The door to the greenhouse was locked and the screen was hooked. Only the petitioners had keys or access to the greenhouse. The gate down by the highway was also locked, with petitioners' keys fitting both locks, and only petitioners had access to the gate and premises. The Affidavit for Search Warrant (R.-I, pp. 5, 6 and App. E, p. E-1) and the Search Warrant (R.-I, p. 3 and App. E, p. E-4), revealed the search warrant was a "federal warrant" as:

1. The attorney for the Government requested the Federal Magistrate issue the warrant (Rule 41(a));

2. The Affidavit for Search Warrant is captioned "In The United States District Court for the Eastern District of Oklahoma, United States of America - vs. - 1,200-1,500 pounds of marijuana, No. 79 - 3";

3. The Affidavit was before "Richard Cornish, United States Magistrate, McAlester, Oklahoma" and sworn to before and subscribed in the United States Magistrate's presence;

4. The Affidavit for Search Warrant alleges a violation of the United States Code, citing the section, "In the Eastern District of Oklahoma, there is now being concealed certain property, namely 1,200-1,500 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1)";

5. The Search Warrant is in the federal form, captioned "United States District Court for the Eastern District of Oklahoma, United States of America - vs - 1,500 pounds of marijuana, Docket No. 79-3";

6. The Search Warrant is directed "To: U. S. Marshal, or any other authorized law enforcement officer";

7. The Search Warrant alleges a violation of the U. S. Code, citing the section, "There is now being concealed certain property, namely 1,200-1,500 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1)";

8. The Search Warrant commands the search "to be made within a period of time not to exceed ten days";

9. The Search Warrant is commanded "At any time in the day or night (21 U.S.C. 879)";

10. The written inventory of the property seized and return of the warrant is to be before "Richard P. Cornish, Federal Judge or Magistrate, as required by law";

11. The Search Warrant is issued by "Richard P. Cornish, Judge (Federal or State Court of Record) or Federal Magistrate";

12. The Search Warrant contains in printed form at the bottom: "The Federal Rules of Criminal Procedure Provides; 'the warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime' (Rule 41(c)). A statement of the grounds for reasonable cause should be made in the affidavit if a search is to be authorized 'at any time day or night' pursuant to Rule 41(c)";

13. The return is made on a federal form;

14. The return is made to: "Richard P. Cornish, Federal Magistrate";

15. The petitioners were taken into custody and booked into the Pontotoc County Jail as federal prisoners;

16. The petitioners were subsequently charged by complaint in the United States District Court for the Eastern District of Oklahoma, McAlester Magistrate's Docket No. 79-3 with "Knowingly, intentionally, and unlawfully possessing with intent to distribute approximately 1,200-1,500 pounds of marijuana, a Schedule-I Controlled Substance in violation of U.S.C., Tit. 21, §841 (a)(1)";

17. The petitioners were subsequently indicted for the offense arising from the search in the United States

District Court for the Eastern District of Oklahoma, No. 79-42-CR;

18. The petitioners have not been charged, and no information has been filed for the offenses in the State Courts.

REASONS FOR GRANTING THE WRIT

The U. S. Magistrate, in issuing the search warrant, properly directed it to a federal officer pursuant to Rule 41(c), Federal Rules of Criminal Procedure. The state officer, in executing the search warrant without the presence of a federal officer, violated the provisions of 18 U.S.C. 3105. The search was abusive and resulted in the needless destruction of the interior and exterior of the greenhouse. The present Petition for Writ of Certiorari presents an important question of federal law which has not been, but should be specifically settled by this Court; the Appeals Court has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; the Appeals Court has decided a federal question in a way in conflict with applicable decisions of this Court, and the Appeals Court has sanctioned such a departure from the accepted and usual course of judicial proceedings by the lower court, as to call for an exercise of this Court's power of supervision for the protection of the integrity of the federal courts.

State Agent Freddie Means, after being contacted by a County Deputy Sheriff concerning a possible marijuana violation, conferred with an Assistant U. S. Attorney for the Eastern District of Oklahoma. The Assistant U. S. Attorney contacted and arranged an appointment for the state

agent to meet with the U. S. Magistrate regarding a search warrant, consistent with Rule 41 (a), Federal Rules of Criminal Procedure.

State Agent Means was the sole affiant on the Affidavit for Search Warrant. The U. S. Magistrate issued the search warrant directed:

> "To: U. S. Marshal or any other authorized law enforcement officer."

State Agent Means, rather than contacting a U. S. Marshal or appropriate federal officer, took the search warrant and executed it with four other state and county officers. The state officers, in executing the search warrant without any federal officer present, conducted an abusive search of the premises by virtually destroying the interior and exterior of the greenhouse.

The search warrant was issued by the U. S. Magistrate pursuant to Rule 41 (c) (1), Federal Rules of Criminal Procedure, which is in pertinent part:

> "The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof, or to a person so authorized by the President of the United States."

It was established at the Evidentiary Hearing that Freddie Means was not a civil officer of the United States authorized to enforce or assist in enforcing any law thereof, or a person so authorized by the President of the United States. Further, there was no such officer present when the five state and county officers executed the search warrant on petitioners' premises.

If, in fact, Agent Means had been a federal law enforcement officer, it would have been unnecessary for him to have even contacted the Assistant U. S. Attorney to make the request of the U. S. Magistrate, since u. der Rule 41(a), Federal Rules of Criminal Procedure, a federal law enforcement officer, as well as an attorney for the Government, could make the request.

This Court held in *Rea* v. *United States,* 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed.2d 233 (1956), that the Federal Courts sit to enforce federal law, including the processes issuing from those courts, with the Court stating at page 294:

> "[5-7] The command of the Federal Rules is in no way affected by anything that happens in a state Court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal Courts sit to enforce federal law; and federal law extends to the process issuing from those Courts. The obligation of the federal agent is to obey the Rules. They are drawn for the innocent and guilty alike. They prescribe standards for law enforcement."

Congress recognized that this Court has the power to prescribe the rules, and further, the Federal Rules of Criminal Procedure are not merely admonitory, but rather have the force of law. In fact, 18 U.S.C. §3771, Rules of Criminal Procedure, provides, stating in pertinent part:

> "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

It is the petitioners' position that since this search was federal, the provisions of Rule 41 must be strictly ad-

hered to in all respects. The notes of the advisory committee on rules recognized that Rule 41 superseded the general provisions of 18 U.S.C. former 611-626 relating to search warrants, including what is now 18 U.S.C. 3105. The persons authorized to serve search warrants are outlined in 18 U.S.C. 3105:

> "A search warrant may, in all cases, be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requesting it, he being present and acting in its execution."

18 U.S.C. 3105 confers no substantive authority to execute a search warrant, *United States* v. *Signal*, 341 F.2d 837 (3rd Cir. 1965).

This Court had before it in *Gambino* v. *United States*, 275 U.S. 310, 48 S.Ct. 137, 12 L.Ed. 293 (1927), the question of whether State Troopers were "agents of the United States" under the statutory language authorizing "any officers of the law" to arrest and search under the *National Prohibition Act*, 27 U.S.C.A. 40, with the Court holding at page 137:

> "We are also of the opinion that the term 'any officers of the law,' used in Section 26 refers only to federal officers, and that the troopers were not, at the time of the arrest and seizure, agents of the United States."

Once the search warrant left the hands of the U. S. Magistrate, service of the same was controlled by the applicable federal law. Affiant Freddie Means had no more authority to execute the federal search warrant than would

have the "reliable, confidential informant," had he been the affiant appearing before the Magistrate.

The notes of Advisory Committee on Rules, note to subdivision 41(c), enumerates:

> "This rule is a restatement of existing law." 18 U.S.C., former §§613-616, 620; *Dumbra* v. *United States*, 268 U.S. 435, 45 S.Ct. 546, 69 L.Ed. 1032.

Dumbra, supra, held that a Federal Prohibition Agent "who was an agent and employee of the United States" was an authorized officer under the provisions of the Espionage Act, wherein the warrant was directed to a "civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof."

Following the same body of existing law adopted by Rule 41(c) are the cases of *Perry* v. *United States*, 14 F.2d 88 (9th Cir. 1926); *Leonard* v. *United States*, 6 F.2d 351 (1st Cir. 1925); *United States* v. *Smith*, 16 F.2d 788 (S.D. Fla. 1926), and *United States* v. *Dziadas*, 287 Fed. 837 (N.D. W.Va. 1923).

All four of the above cases support the proposition that suppression is mandated when a search warrant is executed by an officer not authorized by statute, and all cases involve the interpretation of what was then Sections 6 and 7 of the *Espionage Act* or Section 25, Title 2 of the *National Prohibition Act* (now Rule 41(c) and 18 U.S.C. §3105).

The Court in *Deziadas*, supra, held the execution of a search warrant by a person not named therein, nor shown

to have been acting for a person so named and in his presence, was unlawful and suppressed the property seized.

The Court in *Smith,* supra, held void the service by Prohibition Agents, not named therein, of a search warrant directed to: "J. H. Lee, Internal Revenue Officer of the United States for the 7th District of Florida, to his deputies or any or either of them, and to _____, Federal Prohibition Agent, and his deputies or either of them", with the Court stating at page 788:

> "[3] Now, it is true that these statutes give authority to make searches and seizures, but they must be construed strictly (Giles v. United States [CA] 284 F. 298) and I find absolutely nothing in this warrant to justify me in saying that Prohibition Agent Bean, who made this return, had any authority under the direction in the warrant to execute it."

The court in *Leonard, et al.,* supra, held that statutes authorizing search warrants are strictly construed, sustaining the Motion to Suppress and holding the search illegal where the warrants were not executed by the Prohibition Officer to whom they were directed, but by a stranger, not one named in the direction and not executed in the presence of the officer directed in the search warrant to execute the same.

The court in *Perry,* supra, held "that the direction in the search warrant was an essential part of it, and that because the plain language of the statute was disregarded, not alone in respect to the direction of those officers who were authorized to serve, but also in respect to those who did serve it, the objections to the warrant and to the use

of the evidence obtained in the search were well taken and should have been sustained."

In petitioners' case, the return was signed by Freddie K. Means, Agent OBN as the officer executing the search warrant. There is no indication that he was accompanied by "a civil officer of the United States authorized to enforce or assist in enforcing any law thereof", nor is there any indication that State Agent Means was, or was accompanied by, "a person so authorized by the President of the United States." In fact, the testimony conclusively establishes the only parties present were two county deputy sheriffs, one Oklahoma Highway Patrolman, and two state agents. While the U. S. Marshal is clearly a "civil officer" within the meaning of Rule 41, there is no indication of his execution and/or presence shown on the face of this instrument. The testimony again conclusively revealed the nonpresence of a U. S. Marshal.

As recognized by Circuit Judge McKay in his dissenting opinion in petitioners' case, "No case has suggested that the one to whom a federal warrant is directed should not at least be present during its execution."

The actions by State Agent Means in executing the federal warrant had no more validity than the identical reverse situation in the Oklahoma case of *Dunn* v. *State*, 40 Okl. Cr. 76, 267 P. 279 (1928), where a Federal Prohibition Agent was the affiant for a state search warrant directed to state officials. The prohibition agent did not deliver the search warrant to the sheriff for execution; but instead served it and made a return as Federal Prohibition Officer. The Oklahoma Court of Criminal Appeals held

the Motion to Suppress should have been sustained, stating at page 78:

> "A Federal Prohibition Officer is a private person so far as the State statutes are concerned, and is without any authority to execute State process, except as he may do the same in aid of any State officer's name in the process."

Agent Means was not a civil officer of the United States, but was an officer of another sovereign — the State of Oklahoma. The authority of Agent Means to execute a federal search warrant was no more than that of any other stranger or citizen.

The execution by state officers of a search warrant directed to federal officers would violate Rule 41(c) and 18 U.S.C. §3105, since the federal officer would not be present and since state officers had no independent authority under federal law to execute search warrants.

As again recognized by Circuit Judge McKay in his dissenting opinion in petitioners' case:

> "The Supreme Court 'in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or *Federal Rules of Procedure.*'" *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (Emphasis added).

The applicability of the exclusionary rule to searches involving violation of statutory guidelines finds further support in this Court's decision in *Miller* v. *United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958), where violation of the Knock-and-Announce provision as required

by federal statute and made applicable in the District Court by a District of Columbia Circuit Rule required suppression of evidence. *Miller*, supra, was cited with approval in *United States* v. *Caceres*, 99 S.Ct. 1465, 1473 and note 21 (1979) (distinguishing violation of inner-agency rule from violation of statute).

The provisions of Rule 41 govern the conduct of the search itself and implement the Fourth Amendment protections requiring the officer to strictly comply with all the directions contained in the warrant. The provisions in the warrant thus provide for, among others:

(a) What is to be seized, *Stanford* v. *Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 341 (1965);

(b) When the items can be seized, 21 U.S.C. 879;

(c) How entry can be made to seize the items. *Sabbath* v. *United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968); and

(d) Who can seize the items, 18 U.S.C. 3105 and Rule 41.

Petitioners submit that suppression is mandated where the requirements of conduct governing the search itself are violated, as opposed to a violation of inventory or return, which are ministerial only, and do not govern the conduct of the search itself.

The clear, concise wording of federal law concerning to whom a search warrant must be directed and who can execute the warrant, makes it impossible to find a case on all fours. Petitioners submit that because of the specific guidelines, there has probably been no prior case wherein state officers executed a federal search warrant which was

directed to federal officers, where the federal officer was not present. There are several decisions interpreting the applicability of Rule 41 to state officers obtaining a state-issued search warrant, which have had sufficient federal nexus to classify the search as a "federal search."

Navarro v. *United States,* 400 F.2d 315 (5th Cir. 1968), held that where city law enforcement officers cooperate for the benefit of the federal sovereign, all parties must adhere to the federal standards, with the court finding the search impermissible and stating at page 318:

> "[5] The purpose of Rule 41 is to carry out the mandate of the Fourth Amendment. It binds *federal* Courts and *federal* law enforcement officers. . . .
>
> ". . . We do not mean to suggest in any way that we would discourage cooperation between federal and state law enforcement officers. It is essential, however, that such cooperation should comply with the rules. It has been established at least since *Byars* that when state law enforcement officers do cooperate for the benefit of the federal sovereign, all parties must adhere to the federal standards."

United States v. *Sellers,* 483 F.2d 37 (5th Cir. 1973), while holding that a state warrant's failure to comply with Rule 41 may not necessarily be fatal — further held a federal warrant must comply with Rule 41, stating at page 43:

> "[6, 7] A federal Court reviewing the sufficiency of a warrant issued by a state Court, for the purpose of determining whether the fruits of a resulting search are lawful and hence admissible in a federal prosecution, must determine whether the warrant was issued as a federal warrant or as a state warrant. If the warrant was issued under authority of Rule 41 as a

federal warrant, clearly, it must comply with the requirements of the rule."

United States v. *Townsend,* 394 F.Supp. 736 (E.D. Mich. 1975), sustained the motion to suppress where a state officer obtained a state warrant for a federal offense, issued on federal probable cause under Rule 41, and then proceeded to execute the warrant without federal participation in the execution, with the court stating at page 750:

> "Thus, the rule clearly contemplates that in cases such as the one at bar, where there is federal probable cause *in the first instance,* that there be federal participation and supervision in the undertaking. The standards are not 'merely blue prints of procedure for issuance of federal warrants.' (Sellers, at 44). Rather, they are designed to protect the integrity of the federal police power by insuring some measure of control in purely federal matters to federal officers. If state officers were permitted to institute federal warrants without involving federal officers, they would be able to conduct federal investigations themselves. The unpredictable and certainly enormous potential for abuse inherent in such an arrangement is manifest. Therefore, the warrant must fail on that basis."

Townsend, supra, held that Rule 41 mandates federal participation in the execution of search warrants issued solely on federal probable cause and further, there was no meaningful basis for distinguishing this search from those to which courts have applied the federal rules. (394 F. Supp. 751)

United States v. *Radlick,* 581 F.2d 225 (9th Cir. 1978), involved a state-issued search warrant having sufficient federal participation as to require either compliance with

Rule 41 or explain the non-compliance, with the court stating at page 228:

> "The exclusionary rule may be imposed by the Courts to assure that the rules are obeyed."

A different test as to the applicability of Rule 41 to search warrants issued by a State Judge, rather than a U. S. Magistrate, was applied in *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975). A Connecticut State Judge had before him a search warrant and an affidavit and application which were on Connecticut State Forms. The affidavit and application were signed and sworn to by two members of the Connecticut State Police and a member of the United States Treasury Department, Alcohol, Tobacco, and Firearms Division. The court acknowledged the provisions of Rule 41 were included by the Supreme Court for some policy reasons, but reasoned that not all violations of Rule 41 as to search warrants issued by State Judges necessarily mandated the exclusion of evidence unless:

> "(1) There was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed or,
>
> "(2) There is evidence of intentional and deliberate disregard of a provision in the rule." (517 F.2d 386)

Although petitioners contend Rule 41 is fully applicable to the federal search warrant issued by the U. S. Magistrate in this case, the prejudice was shown by the introduction of the photographs depicting the damage and almost total destruction of the premises and interior as well as exterior of the greenhouse during the search.

Further, State Agent Means' actions in executing the Federal Search Warrant, which was directed to Federal Officers, is evidence of an intentional and deliberate disregard of a provision contained in Rule 41.

An analysis of the case relied upon by the majority opinion in petitioners' case, does not support the affirmance. *Burke*, supra, was a federal search warrant issued by a State Judge. Contrary to the majority decision, there apparently was federal participation in the execution and supervision of the search warrant, as the opinion relates:

> "Both the warrant and the affidavit and the application for it were on Connecticut State Forms. The affidavit and application was signed and sworn to by two members of the Connecticut State Police and a member of the United States Treasury Department, Alcohol, Tobacco and Firearms Division." (517 F.2d 379)
>
> and
>
> ". . . the warrant, sought by a federal law enforcement officer, along with state officers . . ." (517 F.2d 384)

Burke, supra, also stated in footnote 15 that they considered the "blueprint" tests suggested in *United States* v. *Sellers*, supra, 483 F.2d at 44, "to be a preferable approach" in applying Rule 41, and expressly noted the rule's requirement of execution by the named officer protects important federal interests (517 F.2d 385 and note 9).

Further, this Court in the exercise of its supervisory power to formulate and apply proper standards for the enforcement of the criminal law in the federal courts, is

not limited to principles derived solely from the Constitution. *McNabb* v. *United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943); *Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). This Court and Congress have clearly spoken by and through Rule 41, Federal Rules of Criminal Procedure, 18 U.S.C. 3105 and 18 U.S.C. 3771.

United States v. *Karathanos*, 531 F.2d 26 (2d Cir. 1976), declined the Government's request to formulate a different version of the exclusionary rule, with the court stating at page 33:

> "We continue to believe that the Supreme Court should retain the exclusive privilege of overturning its own decisions . . ."

A law and its application can only be changed by Congress either by abolition of old law and passage of new law or by amendment of old law clearly showing Congressional intention for the law to have a new meaning. *Tyson* v. *United States*, 285 F.2d 19 (10th Cir. 1960).

Petitioners respectfully submit the search warrant was improperly executed by an unauthorized person; there was non-compliance with Rule 41, which was apparently deliberate and resulted in prejudice by the abusive nature of the search; there was lack of federal participation in the execution of the federal search warrant, and the protection of the integrity of the federal courts mandates the suppression of the evidence.

CONCLUSION

For the reasons hereabove set forth, the petition should be granted and a Writ of Certiorari should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

MAC OYLER, of the Firm
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Oklahoma City, Oklahoma 73102
Tel.: (405) 232-4602
Counsel of Record for Petitioners

Of Counsel:
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201 West 14th
Ada, Oklahoma 74802
For Petitioner Pennington

February, 1981

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 1981, three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed via airmail, postage fully prepaid, return receipt requested, to: The Solicitor General, Department of Justice, Washington, D.C. 20530.

The above listed parties are all of the parties required to be served.

MAC OYLER

APPENDICES

APPENDIX A

[10th Circuit Court of Appeals Majority Opinion]

FILED
DEC 03 1980
United States Court of Appeals
Tenth Circuit
HOWARD K. PHILLIPS, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-1991 and 79-1992

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUTHER T. PENNINGTON and SENATOR HARDING COLBERT, Defendants-Appellants.	)	Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 79-42-CR)

James E. Edmondson, Assistant United States Attorney (Julian K. Fite, United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Mac Oyler of Oyler, Smith & Bane, Oklahoma City, Oklahoma (Thomas S. Landrith, Co-counsel for Appellant Pennington, Ada, Oklahoma, with him on the brief), for Defendants-Appellants.

McWILLIAMS, BREITENSTEIN and McKAY, Circuit Judges.

McWILLIAMS, Circuit Judge.

Pennington and Colbert were convicted of conspiring to possess with an intent to distribute a controlled substance, marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Prior to trial, defense counsel moved to suppress the use at trial of marijuana, and other items, taken in a search of a quonset-hut owned by the defendants. After an evidentiary hearing, the motion to suppress was denied. On appeal, the only issue raised is the correctness of that ruling.

The warrant to search the quonset-hut was issued by a United States Magistrate sitting in McAlester, Oklahoma. The warrant issued on the basis of the affidavit of one Freddie Keith Means, an agent for the Oklahoma Bureau of Narcotics and Dangerous Drugs Control. Prior to the issuance of the warrant, Agent Means had been in touch with an Assistant United States Attorney for the Eastern District of Oklahoma concerning his investigation. We infer that the Assistant United States Attorney encouraged State Agent Means to pursue the case. In any event, we know, from the record, that the Assistant United States Attorney telephonically contacted the United States Magistrate and personally arranged for a time when the Magistrate could conduct a hearing on the matter.

The only evidentiary matter before the Magistrate when he issued a warrant to search the quonset-hut owned by the defendants for marijuana was the affidavit of Agent Means. The warrant was directed to the "U. S. Marshal or any other authorized law enforcement officer." The warrant was executed by Agent Means, a fellow agent for the Oklahoma Bureau of Narcotics and Dangerous Drugs Control, two deputy sheriffs for Pontotoc County, Oklahoma, and a member of the Oklahoma State Highway Patrol. The search of the quonset-hut, which was being used as a greenhouse, disclosed a great number of growing marijuana plants, many of which were in the seedling stage.

The primary ground urged for reversal is that the execution of a federal search warrant by state officers does not comply with Fed. R. Crim. P. 41(c) and therefore voids the search and renders the items seized in the search inadmissible in a federal prosecution. Under the circumstances, we do not agree with this argument. In resolving this particular issue, we shall assume the initial applicability of Rule 41(c), though Government counsel makes some suggestion to the contrary.

There is no doubt that in the instant case we are concerned with a federal search, as opposed to a search that is purely state in character. The warrant was issued by a United States Magistrate in connection with an alleged violation of federal law. An Assistant United States Attorney had arranged for the state drug agent to go before the Magistrate in an effort to secure a search warrant. The federal government had a "hand" in the matter, even though the affiant before the Magistrate was a state official, and therefore this was a federal search. Lutsig v. United States, 338 U.S. 74, 78 (1949) and United States v. Rios, 611 F.2d 1335, 1347 (10th Cir. 1979).

Being a search which is "federal in character," the legality of the search is conditioned on a finding that the warrant satisfies constitutional requirements and certain provisions of Fed. R. Crim. P. 41 "designed to protect the integrity of the federal courts or to govern the conduct of federal officers." United States v. Millar, 543 F.2d 1280, 1284 (10th Cir. 1976) and United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973), *cert .denied*, 417 U.S. 908 (1974).

As above indicated, the warrant here involved issued to the "U. S. Marshal or any other authorized law enforcement officer." Counsel points out that Fed. R. Crim. P. 41(c) provides only that the warrant "shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States." At the evidentiary

hearing on the motion to suppress. Means conceded that he was neither "a civil officer of the United States" nor had he been "so authorized by the President of the United States," and that no federal agent or officer assisted in the execution of the warrant. Such deviation from 41(c), however, does not justify invoking the exclusionary rule.

A case quite similar to the instant one is United States v. Burke, 517 F.2d 377 (2nd Cir. 1975). The warrant in *Burke* was issued by a state judge, not a United States Magistrate, as in the instant case. However, in our view, that is not significant, since in *Burke*, as here, the search was federal in character. Being a federal search, the Second Circuit in *Burke* held that the search is governed by Rule 41.

In *Burke*, the warrant was issued to, and executed by, a state officer, and not a "civil officer of the United States . . . or a person so authorized by the President of the United States," as provided for by Rule 41(c). Notwithstanding this deviation from the rule, the Second Circuit declined to apply the exclusionary rule. That Court opined that courts should generally be "wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude." 517 F.2d at 386. More specifically, the Second Circuit commented as follows:

> . . . violations of Rule 41 alone should not lead to exclusion unless (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule. Id., at 386-387.

Applying to the instant case the rationale of *Burke*, we conclude that the fact that the warrant was executed by a state officer, and not "a civil officer of the United States" or "a person so authorized by the President of the United States," as provided by Rule 41(c), does not require invoking the exclusionary rule. There is nothing to indi-

cate that the search would not have occurred but for the violation of the rule, or would not have been "so abrasive" if the rule had been followed. In this latter regard, counsel suggests that the state officials, in collecting the evidence found in the quonset-hut greenhouse, inflicted some damage to the premises which would not have occurred had federal officials been involved. The assertion that federal officials would have been more neat and tidy in executing the search warrant is problematical. Any damage was incidental to the gathering of evidence, which, under the circumstances, was no small chore. The quonset-hut greenhouse was chock-full of growing marijuana plants, with stalks some 12 feet high. Photographs were taken which required some staging. Suffice it to say, the defendants in the instant case did not show any real prejudice resulting from the fact that the warrant was executed by state officials, without federal help. See United States v. Turner, 558 F.2d 46, 52 (2nd Cir. 1977) and United States v. Dudek, 530 F.2d 684, 688 (6th Cir. 1976).

Applying the second prong of the *Burke* test, there is nothing in the record to indicate that the deviation from the literal requirements of Rule 41(c) was either intentional or deliberate, or that such in anywise undermined the integrity of the whole process. 517 F.2d at 387. In sum, the fact that the warrant was executed by a state officer, who was authorized under Oklahoma law to execute search warrants, and not by a federal official, is not, under the circumstances here disclosed, such a deviation from Rule 41(c) as would justify invoking the exclusionary rule.

The second ground urged for reversal concerns the sufficiency of the affidavits. Counsel contends that the affidavit does not measure up to the probable cause requirements of the Fourth Amendment. We disagree.

The warrant issued on the basis of Means' affidavit. In that affidavit Means stated that he had "met" a confidential and reliable informant who had advised him that

he (the informant) had seen marijuana plants in a great number growing in the quonset-hut located on defendants' property. The informant indicated how he could tell that the plants he observed were in fact marijuana plants.

At the evidentiary hearing on the motion to suppress, it was brought out that Agent Means had "met" the informant in a telephone conservation and not in a "face-to-face" situation. Whether this is an inaccuracy is debatable. One can "meet" another over the phone, as well as in person. In any event, it is not such an inaccuracy as would go to the integrity of the warrant. The important thing is the type of information relayed to the agent by the informant, and not the means of transmission of such information. See United States v. Turner, 558 F.2d at 50.

In the affidavit, Agent Means characterized the informant as being reliable. Agent Means had actually never had any contact with the informant before their telephone conversation. However, Agent Means did check out the informant's name, in at least a limited sense, and found that he had no criminal record. Also, Agent Means inquired of a local sheriff who considered the informant to be reliable and truthful. It developed at the evidentiary hearing that the local sheriff actually didn't have a great deal of knowledge about the informant. Be that as it may, such discrepancies are only minor in nature, and under the circumstances do not affect the ultimate determination by the Magistrate that there was probable cause to search defendants' quonset-hut greenhouse. United States v. Axselle, 604 F.2d 1330, 1338 (10th Cir. 1979).

We emphasize the fact that the informant here involved was not a paid or professional informant, whose tips are sometimes open to suspicion. Rather, the informant was a private citizen who went onto the defendants' premises at their request to perform some excavating and leveling services, and while there observed the growing marijuana. As a public spirited citizen, he felt compelled,

and commendably so, to report what he had seen to the proper officials. In United States v. McCoy, 478 F.2d 176, 179 (10th Cir. 1973), we noted that the fact that an affidavit sets forth information acquired from eyewitnesses to a crime, rather than from a professional informer, is of "considerable significance in connection with the magistrate's determination as to the reliability of the affiant's sources of information." In *McCoy*, we made reference to United States v. Bell, 457 F.2d 1231 (5th Cir. 1972), which held that though a supporting affidavit in an application for a search warrant must generally attest to the credibility of an informant and his information, such requirement did not extend to information acquired from an eyewitness to a crime.

Judgment affirmed.

APPENDIX B

[10th Circuit Court of Appeals Dissenting Opinion]

FILED
DEC 05 1980
United States Court of Appeals
Tenth Circuit
HOWARD K. PHILLIPS, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-1991 and 79-1992

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 79-42-CR)
v.	)	
LUTHER T. PENNINGTON and SENATOR HARDING COLBERT, Defendants-Appellants.	)	

James E. Edmondson, Assistant United States Attorney (Julian K. Fite, United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Mac Oyler of Oyler, Smith & Bane, Oklahoma City, Oklahoma (Thomas S. Landrith, Co-counsel for Appellant Pennington, Ada, Oklahoma, with him on the brief), for Defendants-Appellants.

McWILLIAMS, BREITENSTEIN and McKAY, Circuit Judges.

McWILLIAMS, Circuit Judge.

[APPENDIX]

McKAY, Circuit Judge, dissenting:

I agree with the majority's conclusion that the search and seizure at issue here is governed by the federal standards of the Fourth Amendment and Fed. R. Crim. P. 41, particularly the requirement of Rule 41(c)(1) that "[t]he warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States." The tenor of this rule makes clear that the officer to whom the warrant is directed must be the one who executes it.[1] The majority concedes that the quoted provision was violated in this case insofar as the warrant whose fruits formed the basis of defendants' convictions was not executed by a "civil officer of the United States" or by one authorized by the President to assist in enforcing federal law. Even so, the majority adopts the "harmless error" rule of *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975) and declines to suppress this tainted evidence.

Burke's policy of being "wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude," 517 F.2d at 386, should be viewed with a degree of skepticism.[2] The Supreme Court

---

[1] It may be that federal warrants need not be directed to a *specific* person, *see* United States v. Clancy, 276 F.2d 617, 629 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961); *but see* United States v. Soriano, 482 F.2d 469, 478 (5th Cir. 1973), and that non-federal officers can assist a federal officer in executing a federal warrant, *see* United States v. Martin, 600 F.2d 1175, 1181-82 (5th Cir. 1979), but no case has suggested that the one to whom a federal warrant is directed should not at least be present during its execution.

[2] A recent amendment to Rule 41(c) states: "Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a

"in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, *or federal rules of procedure.*" *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (emphasis added). The dispositive question, then, is not whether the error before us is of constitutional magnitude but whether the relevant language of Rule 41(c)(1) expresses a concern important enough to warrant vindication by a rule that excludes evidence obtained in violation of that language.

The portion of Rule 41(c)(1) at issue here has been a subject of judicial concern primarily during the prohibition era. At that time, several "rum-runners" sought to challenge convictions that were based on evidence seized pursuant to warranted searches by federal prohibition agents. The issue in these cases was whether such agents were "civil officier[s] of the United States" as required by Rule 41's antecedent.[3] The courts found that federal prohibition agents were "civil officer[s] of the United States." *See Steele* v. *United States*, 267 U.S. 505 (1925). At no time, however, did the courts assume that evidence seized by

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[2] (Continued)
written affidavit." Rule 41(c)(2)(G). This provision implies that Congress intends that material violations of Rule 41 often must, upon proper motion, result in suppression of the evidence obtained pursuant to such a violation, and that any deviation from this general exclusionary rule should be based upon an express statutory exception such as Rule 41(c)(2)(G).

[3] Rule 41's precursor was Section 6 of Title XI of the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217, 229, which also limited the execution of serach warrants to "civil officer[s] of the United States." The legislative history on the part of the Espionage Act dealing with warrants is sparse: "This Title [Title XI] . . . was based upon the New York law on this subject, and follows generally the policy of that law." H.R. Rep. No. 69, 65th Cong., 1st Sess. (1917), quoted in 55 Cong. Rec. 3307 (1917).

prohibition agents would be admissible if the agents had not been found to be "civil officers" within the meaning of the statute. On the contrary, several of the courts stressed the reasons for which only federal officers may execute federal search warrants:

> Congress regarded it as essential that a search warrant should be directed only to an officer or class of officers authorized to enforce or assist in enforcing the laws of the United States, and should be executed only by the officer or class of officers to whom it was directed.

Leonard v. *United States*, 6 F.2d 353, 355 (1st Cir. 1925):

> [U]nder the Espionage Act service of these drastic processes [*i.e.*, executing search warrants] was not committed to casual or even to regular agents or employees of a bureau; it was committed only to "civil officers" . . . holder[s] of a public station, which embraces the idea of tenure, duration, emolument and duties, and is regarded as assuring a legal and proper exercise of power.

Keehn v. *United States*, 300 F. 493, 502-03 (1st Cir. 1924) (Anderson, J., dissenting).

> [Search warrants] are necessary in the execution of government power, and the right to their use is fundamental and lawful; but the courts rarely exercise a more vitally important function than to preserve absolutely inviolate every constitutional and legislative safeguard against the abuse of such process.
>
> . . . .
>
> The clearly stated limitation concerning the issuance of search warrants is that the commissioner "must issue a search warrant to a civil officer of the United States duly authorized to assist in enforcing any law thereof," and the inquiry simply is whether the prohibition agent is "a civil officer of the United States . . . ."

United States v. *Musgrave*, 293 F. 203, 205 (D. Neb. 1923):

> There are (among others) four substantial guards against abuse of process provided [in Title XI of the Espionage Act of 1917, Rule 41's precursor]. . . . [T]he fourth is that the writ must be directed to those selected for their approved judgment and discretion, by whom alone the writ may be executed.

United States v. *Innelli*, 286 F. 731, 732 (E.D. Pa. 1923).

The policy underlying the clear limitation of Rule 41 (c)(1), which was so forcibly explicated by the courts charged with its original application, should apply with equal force today.[4] A federal warrant must be directed to and executed by federal officers. If it is not, evidence seized on the basis of its authority should not be admitted into evidence to prove a violation of a federal statute. Because it is undisputed in this case that the warrant in question was not executed by a federal officer, I would remand this case to the district court for further consideration in light of the principles I have articulated in this opinion.

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[4] Whatever its applicability in other contexts, the "harmless error" rule relied upon by the majority should be rejected whenever, as here, Rule 41 promotes a significant articulable interest. The reasoning which requires that evidence seized without a warrant is to be suppressed even though a magistrate would have issued a warrant had it been applied for applies here:

> A . . . rule "that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." . . . Under such a rule "resort to [warrants] would ultimately be discouraged."

Aguilar v. Texas, 378 U.S. 108, 111 (1964) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948) and Jones v. United States, 362 U.S. 257, 270 (1960)).

APPENDIX C

[10th Circuit Court of Appeals Decision on Motion for Rehearing]

NOVEMBER TERM — January 14, 1981

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James R. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	Nos. 79-1991
	)	79-1992
LUTHER T. PENNINGTON and SENATOR HARDING COLBERT, Defendants-Appellants.	)	

This matter comes on for consideration of the petition of appellants for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, it is ordered:

1. The Petition for rehearing is denied by the panel who rendered the decision sought to be reheard. Circuit Judge McKay voted to grant rehearing.

2. The suggestion for rehearing en banc was transmitted to the members of the panel and to the judges of the court who are in regular active service. No judge in regular active service nor a judge who was a member of the panel that rendered the decision sought to be reheard having requested a vote on the suggestion made by plaintiffs (Rule 35(b), Federal Rules of Appellate Procedure), the suggestion for rehearing en banc is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

APPENDIX D

[Order of United States District Court for the Eastern District of Oklahoma]

FILED
JUL 6 1979
LEWIS L. VAUGHN
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
	)	No. 79-42-CR
LUTHER T. PENNINGTON, and SENATOR HARDING COLBERT, Defendants.	)	

ORDER

The Court now has before it for its consideration the additional grounds raised by the defendants in support of their Motion to Suppress. The Court has given thorough consideration to these new grounds and has concluded that they are without merit. The defendants' Motion to Suppress is therefore overruled in its entirety.

It is so Ordered this *6th* day of July, 1979.

(s) *H. Dale Cook*
H. DALE COOK
United States District Judge

APPENDIX E

[Affidavit for Search Warrant, Search Warrant and Return]

FILED
MAY 31 1979
LEWIS L. VAUGHN
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA	) DOCKET NO. 79-3
	)
v.	) CASE NO. _____
	)
1,200-1,500 POUNDS OF MARIJUANA	) AFFIDAVIT FOR) SEARCH WARRANT

BEFORE Richard Cornish, United States Magistrate, McAlester, Oklahoma

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises described as follows: in Pontotoc County, Oklahoma, proceed on Highway 3 West and Northwest out of Stonewall approximately one mile to Pontotoc County Road 363 which joins State Highway 3 on the South. Continue 3/10 of a mile on Highway 3. At this point a dirt road turn-off joins Highway 3 on the Northeast and leads into a field. A concrete low-water crossing identifies this particular turn-off. A barbed fence and gate separates the turn-off road from the field itself. Approximately 400 yards from State Highway 3 and made accessible by means of the dirt road turn-off into the field is a quonset-hut type of structure approximately 50 feet wide and 150 feet long and 10 feet high. The ends of the structure lie approximately east and west. The west end of the structure is plainly visible from State Highway 3 and is of an off-white or cream color. It appears to

be constructed of a semi-translucent but rigid plastic or fiber glass material. On the right of the pasture road approaching and leading to the main building at a distance of approximately 75 yards is a small, white, wood-frame, peaked-roof structure resembling and believed to be a pump house. Immediately to the east of this small white structure is an old, long passenger bus hulk, the top portion of which is rusted. A white band runs beneath the windows of the bus. This vehicle is also plainly seen from Highway 3, in the Eastern District of Oklahoma,

there is now being concealed certain property, namely 1,200-1,500 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1).

And the facts tending to establish the foregoing grounds for issuance of this Search Warrant are as follows:

(1) Your affiant, Freddie Keith Means, is an agent of the Oklahoma Bureau of Narcotics and Dangerous Drugs Control, and has been for approximately two years;

(2) and that on May 6, 1979, I met with a reliable confidential informant who stated that on May 4, 1979, he was on the above-described premises and saw a quonset-hut type of greenhouse and looked inside it, seeing marijuana plants in great number growing to about 12-feet in height and including many others in seedling stage and in various other stages of growth. He estimated that the marijuana amounted to approximately 1,200-pounds to 1,500-pounds for harvest.

(3) He stated he had previously seen marijuana when a State Game Ranger had pointed out a patch of it which the Ranger had staked out.

(4) He stated that after viewing the marijuana in the greenhouse, he called Pontotoc County Deputy Sheriff Lloyd Bond, who showed him some photographs of marijuana in full leaf. The pictures confirmed the confidential informant's belief that the greenhouse plants are marijuana.

(5) An Oklahoma Bureau of Narcotics and Dangerous Drugs Control check of the confidential informant's criminal record disclosed no arrests or convictions, although Deputy Lloyd Bond indicated to me that the confidential informant may have been arrested and acquitted on a charge of concealing stolen property 17 years ago. Bond stated to me that he knows the confidential informant and considers him reliable and having a reputation for truthfulness. The confidential informant is a life-long resident of Pontotoc County, gainfully employed, and is not a paid or professional informant. His identity is herein undisclosed at his request for fear of reprisal and injury to him, his family and property.

(6) Deputy Bond has personally seen from State Highway 3 the greenhouse quonset-hut described with the premises above and confirmed to me that it, the pumphouse and derelict bus do exist as above described.

(s) *Freddie K. Means*
FREDDIE KEITH MEANS
Agent for Oklahoma Bureau of Narcotics
and Dangerous Drugs Control

Sworn to before me, and subscribed in my presence,

(s) *Richard P. Cornish*
UNITED STATES MAGISTRATE

[APPENDIX]

United States District Court

FOR THE

EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA	Docket No. 79-3
VS.	Case No.
1,200-1,500 POUNDS OF MARIJUANA	SEARCH WARRANT

To U. S. Marshal or any other authorized law enforcement officer

Affidavit(s) having been made before me by Freddie Keith Means that he has reason to believe that on the premises described as follows: In Pontotoc County, Oklahoma, proceed on Highway 3 west and northwest out of Stonewall approximately one mile to Pontotoc County road 363 which joins State Highway 3 on the south. Continue 3/10 of mile on Highway 3. At this point a dirt road turn-off joins Highway 3 on the Northeast and leads into a field. A concrete low-water crossing identifies this particular turn-off. A barbed fence and gate separates the turn-off road from the field itself. Approximately 400 yards from State Highway 3 and made accessible by means of the dirt road turn-off into the field is a quonset-hut type of structure approximately 50 feet wide and 150 feet long and 10 feet high. The ends of the structure lie approximately east and west. The west end of the structure is plainly visible from State Highway 3 and is of an off-white or cream color. It appears to be constructed of a semi-translucent but rigid plastic or fiber glass material. On the right of the pasture road approaching and leading to the main building at a distance of approximately 75 yards is a small, white, wood-frame, peaked roof structure resembling and believed to

be a pumphouse. Immediately to the east of this small white structure is an old, long passenger bus hulk, the top portion of which is rusted. A white band runs beneath the windows of the bus. This vehicle is also plainly seen from Highway 3. There is now being concealed certain property, namely 1200-1500 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1), within the interior of the above described quonset-hut structure, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ten (10) days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search at any time in the day or night* (21 USC 879) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before RICHARD P. CORNISH as required by law

Federal Judge or Magistrate

Dated this *7th* day of *May* *1979*

(s) *Richard P. Cornish*

Judge (Federal or State Court of Record) or Federal Magistrate.

RICHARD P. CORNISH

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*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statment of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

[APPENDIX]

RETURN

I received the attached search warrant *5/8/79* , 1979, and have executed it as follows: *by serving same on Senator Harding Colbert*

On *5/8/79* , 1979 at *6:40* o'clock *P* M, I searched the person or premises described in the warrant and

I left a copy of the warrant with *Senator Harding Colbert* together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

One (1) green plastic laundry-type basket;

Two (2) long-handled pruning shears;

Two (2) short-handled pruning shears;

One (1) brown paper sack containing plastic baggie boxes —these latter being a dozen or more in number.

One (1) large sheet of black plastic

One (1) card board box bearing the name of "Dr. C. P. Pennington"

Numerous stalks of a green leafy substance taken from green house weighing approx. 15 pounds.

Copious samples of green leafy substance in the above mentioned sacks and contained in a card board box.

This inventory was made in the presence of *Agents Atwood & Wright, OBN*

and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

(s) *Freddie K. Means, Agent OBN*

Subscribed and sworn to and returned before me this *9th* day of *May* 1979.

(s) *Richard P. Cornish*
Federal Magistrate

APPENDIX F

U. S. Constitution: Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Persons Authorized to Serve Search Warrant: Tit. 18 U.S.C. §3105

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in and of the officer on his requiring it, he being present and acting in its execution.

Rules of Criminal Procedure: Tit. 18 U.S.C. §3771

> The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district court, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

[APPENDIX]

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Prohibited Acts: Tit. 21 U.S.C. §841

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * * *

Attempt and Conspiracy: Tit. 21 U.S.C. §846

Any person who atempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 41: Federal Rules of Criminal Procedure

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) *Property or Persons Which May Be Seized With a Warrant.* A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose ar-

rest there is probable cause, or who is unlawfully restrained.

(c) *Issuance and Contents.*

(1) *Warrant upon Affidavit.* A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

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No. 80-1470

In the Supreme Court of the United States

OCTOBER TERM, 1980

LUTHER T. PENNINGTON AND SENATOR HARDING COLBERT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1470

LUTHER T. PENNINGTON AND SENATOR HARDING COLBERT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence seized from their quonset hut pursuant to a valid warrant should have been suppressed because the search was conducted by state officers, rather than federal officers, as required by Fed. R. Crim. P. 41(c)(1).

Following a ~~jury~~ bench trial in the United States District Court for the Eastern District of Oklahoma, petitioners were convicted of conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Pennington was sentenced to four years' imprisonment and petitioner Colbert was sentenced to two years' imprisonment. Both prison sentences were suspended in

favor of a three-year term of probation.[1] The court of appeals affirmed (Pet. App. A-1 to A-7), one judge dissenting (Pet. App. B-1 to B-5).

Prior to trial, petitioners moved to suppress evidence seized from a quonset hut owned by them. After an evidentiary hearing, the motion was denied. The evidence at the hearing showed that Freddie Keith Means, an agent for the Oklahoma Bureau of Narcotics and Dangerous Drugs Control, received information from a confidential informant that petitioners were growing marijuana in their quonset hut in Ada, Oklahoma. Agent Means subsequently conferred with an Assistant United States Attorney, who thereafter supervised the investigation in this case and arranged for Means to meet with a United States Magistrate for procurement of a search warrant (Pet. App. A-2). On May 7, 1979, the magistrate issued a warrant to search the quonset hut based entirely on the affidavit of Agent Means (Pet. App. E-1 to E-5). The warrant was directed to the "U.S. Marshal or any other authorized law enforcement officer" (*id.* at E-4). It was executed by Agent Means, a fellow state agent, two deputy sheriffs, and a member of the state highway patrol, all of whom were fully authorized under Oklahoma law to conduct searches. The search of the quonset hut revealed a great number of marijuana plants (Pet. App. A-2).

2. Petitioners contend that the evidence seized from the quonset hut should have been suppressed because Agent Means and the other state law enforcement personnel involved in the search were not "civil officer[s] of the United States" nor "person[s] * * * authorized by the President" to

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[1] Each petitioner additionally received a two-year special parole term. In *Bifulco* v. *United States*, 447 U.S. 381 (1980), this Court recently held that a special parole term may not be imposed as a part of a sentence for a narcotics conspiracy. Petitioners may move for correction of their sentences in the district court under Rule 35 of the Federal Rules of Criminal Procedure.

enforce federal law, within the meaning of Fed. R. Crim. P. 41(c)(1). Because the warrant was issued by a federal magistrate in connection with a violation of federal law, we agree that the search was federal in character and thus subject to the requirements of Rule 41. See *United States* v. *Millar*, 543 F. 2d 1280, 1284 (10th Cir. 1976); *United States* v. *Sellers*, 483 F. 2d 37, 43 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974). We also agree that Agent Means and the other state officers assisting him were not qualified to conduct the search under Rule 41(c)(1) without the presence of federal officers. See also 18 U.S.C. 3105. Nevertheless, the court of appeals correctly concluded that the technical violation of Rule 41 that occurred here did not warrant suppression of the seized evidence.

As this Court noted in *United States* v. *Calandra*, 414 U.S 338, 348 (1974), "the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Because the primary, if not exclusive, purpose of the exclusionary rule is to deter police conduct that violates the Fourth Amendment (see, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976)), the federal courts have declined to extend this drastic, truth impairing remedy to nonconstitutional and nonprejudicial violations of the technical requirements of Rule 41. See, *e.g.*, *United States* v. *Garrett*, 565 F. 2d 1065, 1071 (9th Cir. 1977), cert. denied, 435 U.S. 974 (1978); *United States* v. *Turner*, 558 F. 2d 46, 52 (2d Cir. 1977); *United States* v. *Burgard*, 551 F. 2d 190, 193 (8th Cir. 1977); *United States* v. *Dauphinee*, 538 F. 2d 1, 3 (1st Cir. 1976); *United States* v. *Dudek*, 530 F. 2d 684, 688 (6th Cir. 1976); *United States* v. *Hall*, 505 F. 2d 961, 964 (3d Cir. 1974). See also *United States* v. *Caceres*, 440 U.S. 741 (1979).[2] Rather, it is well

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[2] *Miller* v. *United States*, 357 U.S. 301 (1958), is not to the contrary. In *Miller*, the Court concluded that a violation of the knock-and-announce provision set forth in 18 U.S.C. 3109 warranted suppression

settled that suppression of evidence is an appropriate remedy for the breach of Rule 41 only where the search substantially prejudiced the defendant's rights or where the violation was intentional and deliberate. See, *e.g.*, *United States* v. *Radlick*, 581 F. 2d 225, 228 (9th Cir. 1978); *United States* v. *Dauphinee, supra*, 538 F. 2d at 3; *United States* v. *Burke*, 517 F. 2d 377, 386-387 (2d Cir. 1975).[3]

Here, the violation of Rule 41 was neither deliberate nor prejudicial to petitioners. The court of appeals correctly concluded that "[t]here is nothing to indicate that the search would not have occurred but for the violation of the rule, or would not have been 'so abrasive' if the rule had been followed" (Pet. App. A-4 to A-5, quoting *United States* v. *Burke*, *supra*, 517 F. 2d at 386-387). In light of the AUSA's involvement in this investigation, it is inevitable that federal officers would have conducted the same search that was in fact conducted by state officers. Cf. *United States* v. *Caceres, supra*, 440 U.S. at 752. Moreover, contrary to petitioners' claim (Pet. 5, 19), the court of appeals found that the state officers had not inflicted unnecessary or unreasonable damage on the quonset hut, but that "[a]ny damage was incidental to the gathering of evidence" (Pet.

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of the seized evidence. But Section 3109 has constitutional underpinnings and is designed to protect an individual's reasonable expectation of privacy in his home. In contrast, a search by state agents is no more intrusive than the same search conducted by federal agents. See *United States* v. *Caceres*, *supra*, 440 U.S. at 752.

[3]In light of the First Circuit's decision in *Dauphinee* and the Ninth Circuit's decisions in *Radlick* and *Garrett*, petitioner's reliance (Pet. 12) on *Perry* v. *United States*, 14 F. 2d 88 (9th Cir. 1926), and *Leonard* v. *United States*, 6 F. 2d 353 (1st Cir. 1925), is misplaced. Whatever vitality those decisions retain, both cases were decided before the adoption of Rule 41 and thus do not purport to address the issue in this case.

App. A-5).[4] Likewise, the record fully supports the court of appeals' finding that "the deviation from the literal requirements of Rule 41(c) was [n]either intentional [n]or deliberate, [and did not] in anywise undermine[ ] the integrity of the whole process" (Pet. App. A-5).[5] Further review of these essentially factual questions is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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[4]Furthermore, petitioners do not suggest that any evidence was discovered as the result of the state officers' allegedly unreasonable conduct. Rather, petitioners' claim focuses on the manner in which the officers removed the marijuana plants from petitioners' quonset hut. Insofar as the state officers' allegedly unreasonable search thus did not prejudice petitioners' defense at trial, the appropriate remedy is a damages action rather than the suppression of evidence in this criminal case.

[5]The Fifth Circuit's decision in *Navarro* v. *United States*, 400 F. 2d 315 (1968), is thus readily distinguished. In that case, a local judge, who was not an authorized judge of a "court of record" within the meaning of Rule 41(a), purported to issue a warrant. Because no appropriate judicial officer had passed upon the sufficiency of the affidavit, the search in question was void *ab initio* and the "integrity of the whole process" was called into question. Here, however, a federal magistrate considered and issued an unquestionably valid warrant. Petitioners' sole contention is that the AUSA conducting this investigation should have ordered a federal officer to accompany the state officers who conducted the search.

DOJ-1981-04

No. 80-1470

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LUTHER T. PENNINGTON, and
SENATOR HARDING COLBERT,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF TO MEMORANDUM IN OPPOSITION

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No. 80-1470

In the
Supreme Court of the United States
OCTOBER TERM, 1980

LUTHER T. PENNINGTON, and
SENATOR HARDING COLBERT,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO MEMORANDUM IN OPPOSITION

The Solicitor General concedes that the search warrant was federal in character and was executed by an unauthorized person, stating at page 5 of his Memorandum for the United States in Opposition:

> "Because the warrant was issued by a Federal Magistrate in connection with a violation of federal law, we agree that the search was federal in character and thus subject to the requirements of Rule 41. . . . We also agree that Agent Means and the other state officers assisting him were not qualified to conduct the search under Rule 41(c)(1) without the presence of federal officers. See also 18 U.S.C. 3105. . . ."

This concession is tantamount to a confession of error under *18 U.S.C. 3105* because:

(1) The warrant was not executed by the person to whom it was directed;

(2) The warrant was not executed by a federal officer authorized by law to execute search warrants, and

(3) The warrant was not executed by some other person under (1) or (2) who was present and acting in the execution of the warrant.

The Solicitor General has not cited one case as authority for an unauthorized person to execute a search warrant. Rather, he has attempted to obfuscate the real issue by citing cases relating to the return of search warrants being ministerial acts.[1] The issue is the execution, not the return or the filing of the return of a search warrant.

A reading of the cases cited by the Solicitor General reveals the quotations cited either to be taken out of context and having no bearing on the issues at hand, or to actually sustain petitioners' complaints of error.

The execution by an unauthorized person renders the search illegal, and the suppression is mandated when a search warrant is executed by an officer not authorized by statute.[2]

The Florida Appellate Court in *Hesslerode* v. *Florida*, 369 So.2d 348 (1979), noted there was little case law on

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[1] *United States* v. *Dauphinee*, 538 F.2d 1 (1st Cir. 1976); *United States* v. *Dudek*, 530 F.2d 680 (6th Cir. 1976); *United States* v. *Hall*, 505 F.2d 961 (3rd Cir. 1974); *United States* v. *Burgard*, 551 F.2d 190 (8th Cir. 1977); *United States* v. *Garrett*, 565 F.2d 1065 (9th Cir. 1977); *United States* v. *Turner*, 558 F.2d 46 (2d Cir. 1977).

[2] *Perry* v. *United States*, 14 F.2d 88 (9th Cir. 1926); *Leonard* v. *United States*, 6 F.2d 351 (1st Cir. 1925); *United States* v. *Smith*, 16 F.2d 788 (S.D. Fla. 1926); *United States* v. *Deziadas*, 287 Fed. 837 (N.D. W.Va. 1923).

point concerning the execution of a search warrant by an unauthorized party, reasoning it was so basic that most law enforcement agencies comply with the obvious and plain directions. Based upon the *Fourth Amendment* from which they received *Section 12, Article 1* of the Florida Constitution, the Court held the search warrant to be fatally defective because it was directed to one category of peace officers and yet another category of police executed the warrant.

Just as the Solicitor General concedes that this Court in *Miller* v. *United States,* 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958), concluded a violation of *18 U.S.C. 3109* warranted suppression; petitioners submit that a violation of *18 U.S.C. 3105* likewise warrants suppression. Both statutes have constitutional underpinnings and are designed to protect an individual's reasonable expectation of privacy.

Contrary to the Solicitor General's assertion, petitioners suggest that all evidence was discovered as a result of the state officer's unauthorized and illegal act in executing the search warrant in violation of *18 U.S.C. 3105.*

Petitioners further suggest the unauthorized execution was illegal pursuant to *Rule 41(c) F.R.C.P.*[3], which has the force of statute pursuant to *18 U.S.C. 3771.*

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[3] A different test as to the applicability of Rule 41 to search warrants issued by a State Judge, rather than a U.S. Magistrate, was applied in *United States* v. *Burke,* 517 F.2d 377 (2d Cir. 1975). The prejudice is exemplified under the *Burke* doctrine by an examination of petitioners' photographs contained in the record before this Court, which depict the useless destruction of the premises searched. It should be further recognized that there was apparently federal participation in the execution and supervision of the search warrant in *Burke* [517 F.2d

CONCLUSION

The Solicitor General's concession that the state agents had no authority to execute the instant search warrant is a confession of error.

For the reasons above set forth, the petition should be summarily granted and a Writ of Certiorari should issue to the United States Court of Appeals for the Tenth Circuit reversing the convictions with directions to dismiss.

Respectfully submitted,

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For Petitioner Pennington

April, 1981

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[8] (Continued)

379 and 384]. The second distinctive doctrine of the *Burke* case was evidence of intentional and deliberate disregard of a provision in the Rule. This is also present in petitioners' case, and *United States* v. *Radlick*, 581 F.2d 225 (9th Cir. 1978), recognized the exclusionary rule may be imposed to assure the Federal Rules are obeyed, where no effort was made to comply on a State warrant wherein there was federal participation.

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 1981, three (3) true nd correct copies of the above and foregoing Reply Brief to Memorandum in Opposition were mailed via airmail, postage fully prepaid, return receipt requested, to: The Solicitor General, Department of Justice, Washington, D. C. 20530.

The above listed parties are all of the parties required to be served.

MAC OYLER